IN THE

Supreme Court Of The United States

OCTOBER TERM, 1952

~~No. 271, Misc.~~ 886 20

BENNIE DANIELS AND LLOYD RAY DANIELS,
PETITIONERS,

VS.

ROBERT A. ALLEN, WARDEN OF THE CENTRAL PRISON OF NORTH CAROLINA,
RESPONDENT.

BRIEF OF ROBERT A. ALLEN, WARDEN OF THE CENTRAL PRISON, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI.

HARRY McMULLAN,
Attorney General of North Carolina.

RALPH MOODY,
Assistant Attorney General of North Carolina.

R. BROOKES PETERS, JR.,
General Counsel of State Highway & Public Works Commission.

E. O. BROGDEN, JR.,
Attorney for State Highway and Public Works Commission.

Attorneys for Robert A. Allen,
Warden of Central Prison, Respondent.

INDEX

TABLE OF CASES

STATUTES

ARTICLES CITED

MISCELLANEOUS

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1951

No. 271, MISC.

BENNIE DANIELS AND LLOYD RAY DANIELS,
PETITIONERS,

VS.

ROBERT A. ALLEN, WARDEN OF THE CENTRAL PRISON OF NORTH CAROLINA,
RESPONDENT.

BRIEF OF ROBERT A. ALLEN, WARDEN OF THE CENTRAL PRISON, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE

The petitioners, Bennie Daniels and Lloyd Ray Daniels, have applied to this Court for a writ of *certiorari* for the purpose of having this Court review a decision of the United States Court of Appeals for the Fourth Circuit, the same being No. 6330, decided November 5, 1951, ... Fed. (2d) .....

The transcript of evidence and other proceedings in the trial of petitioners in the State Court, the same being the Superior Court of Pitt County, consists of four volumes which are a part of the record in this case. References to this transcript will be referred to as the State Transcript and abbreviated as "S.Tr.". There is also a transcript of

evidence in the Federal Court which resulted from the hearing on the *habeas corpus* proceeding which we refer to as Federal Transcript and in this brief will be abbreviated as "F.Tr.".

The procedural history of this case is as follows:

1. The petitioners were indicted by a bill of indictment returned by the Grand Jury of Pitt County, North Carolina at the March Term, 1949, of the Superior Court charging them with murder in the first degree for the killing of William Benjamin O'Neal. (S.Tr. Vol. 1, p. 168) Two members of the Pitt County Bar were appointed by the Court to defend the petitioners, and the petitioners were arraigned upon a bill of indictment and entered pleas of not guilty. (S.Tr. Vol. 4, p. 2) The case was continued, and the petitioners were sent to the State Hospital at Goldsboro for mental examination. At the April Term of Court, the petitioners retained counsel of their own choice, Herman L. Taylor, of the Wake County Bar, and C. J. Gates, of the Durham County Bar, and counsel theretofore appointed by the Court were discharged. The psychiatrist at the State Hospital at Goldsboro having reported that the petitioners should stand trial from a mental standpoint, the petitioners were placed on trial on the 30th day of May, 1949.

2. Upon the calling of the case and after petitioners had been arraigned and entered pleas of not guilty at a former term, the petitioners moved to quash the indictment and challenged the array of petit jurors, alleging exclusion of Negroes from the Grand and petit juries of Pitt County because of race. The trial judge heard the evidence and made findings of fact and overruled the motion to quash and the challenge to the array. (S.Tr. Vol. 1, pp. 2-167) Findings of fact in order of the State trial judge will be found in S.Tr. Vol. 4, pp. 4-22. During the progress of the trial, the State offered in evidence certain confessions of the petitioners, and in the absence of the jury, the State trial judge passed upon the question of the voluntariness of the confessions and found that the same had been freely and voluntarily made and allowed the confessions to be

used in evidence. As to this hearing on the confessions, see S.Tr. Vol. 1, p. 268, and for the confessions themselves which were reduced to writing, see S.Tr. Vol. 1, pp. 273-276, Exhibit 8; pp. 276-278, Exhibit 9; and pp. 363-364, Exhibit 32.

3. The petitioners were convicted of murder in the first degree in the Superior Court of Pitt County, without recommendation of life imprisonment, and sentence of death was imposed in accordance with the laws of the State on the 6th day of June, 1949. Notice of appeal to the Supreme Court of North Carolina was given in open Court (S.Tr. Vol. 4, p. 681), and in accordance with the law of the State (§ 1-282 of the General Statutes), the petitioners were allowed sixty days from the date of judgment in which to serve statement of case on appeal, and the State was allowed forty-five days in which to serve exceptions or countercase. On August 6, 1949, counsel for petitioners attempted to serve statement of case on appeal by merely leaving the statement of case on appeal in the office of the prosecuting attorney for the State with his secretary. The solicitor or prosecuting attorney for the State filed exception to the petitioners' statement of case on appeal and also entered a motion to strike out the petitioners' statement of case on appeal because the same was not served within the time fixed by law and by the Court. The matter was heard by the State trial judge on the 29th of September, 1949, and the State's motion to strike out the statement of case on appeal was allowed, the order carrying out the motion being entered on the first day of October, 1949.

4. Prior to the entry of the order striking out the case on appeal, counsel for petitioners filed a petition for *certiorari* in the Supreme Court of North Carolina, on September 27, 1949, and a supplemental petition for *certiorari* was also filed by counsel for petitioners in the Supreme Court of North Carolina on October 10, 1949. An affidavit was also filed by Herman L. Taylor, of counsel for the petitioners, in the Supreme Court of North Carolina on October 10, 1949, and other papers. On November 2, 1949, the Supreme Court of North Carolina dismissed these applica-

tions for *certiorari*, the decision being reported as STATE v. DANIELS, 231 N. C. 17, 56 S.E. (2d) 2.

5. During the month of November, 1949, petitioners, after notice, filed a petition in the Supreme Court of North Carolina for a writ of error *coram nobis*. The State filed answer to this petition, and on December 14, 1949, the Supreme Court of North Carolina issued its decision, the same being reported as STATE v. DANIELS, 231 N. C. 341, 56 S.E. (2d) 646.

6. Thereafter, the State filed a motion in the Supreme Court of North Carolina to docket the record and dismiss the appeal under Rule 17 of the Rules of the Supreme Court of North Carolina, and upon this motion, the Supreme Court of North Carolina issued an opinion dismissing the appeal which is reported as STATE v. DANIELS, 231 N. C. 509, 57 S.E. (2d) 653.

7. On March 2, 1950, the Chief Justice of the Supreme Court of North Carolina entered an order staying execution on the judgment, and petitioners filed an application in this Court for a writ of *certiorari*, and on May 8, 1950, this Court issued its decision denying the application for writ of *certiorari*. See DANIELS v. NORTH CAROLINA, 339 U. S. 954, 94 L.ed. 1366. This denial was without any dissent.

8. Petitioners then filed another petition in the Supreme Court of North Carolina on the 11th day of May, 1950, seeking a writ of error *coram nobis*. The State filed answer to this petition, and on May 24, 1950, the Supreme Court of North Carolina issued its decision denying this application, the same being reported as STATE v. DANIELS, 232 N. C. 196, 59 S.E. (2d) 430.

9. The petitioners then filed application and petition for writ of habeas corpus in the District Court of the United States for the Eastern District of North Carolina. The District Court issued a stay of execution and the respondent, Warden of the Central Prison, filed return and answer to the writ on June 20, 1950. Hearings were held on this petition and the answer and return made thereto on December 18, 1950, through December 21, 1950, and the

case was argued before the District Judge on May 18, 1951: On July 14, 1951, the District Court filed its findings of fact, conclusions of law and opinion and issued an order remanding the petitioners to the respondent warden to the end that the judgment of the State Court be carried out. The opinion of the District Judge is reported as DANIEL v. CRAWFORD, 99 F. Supp. 208. The petitioners appealed to the United States Court of Appeals for the Fourth Circuit, certificate of probable cause and stay of execution having been issued by the District Judge.

10. The appeal was heard by the United States Court of Appeals for the Fourth Circuit on October 12, 1951, and the judgment of the District Court was affirmed by the decision of the Court of Appeals, the same being Decision No. 6330, decided November 5, 1951, and reported as ..... Fed. (2d) ..... Judge Soper filed a dissenting opinion. The petitioners then filed this petition for writ of *certiorari* which is now before this Court.

QUESTIONS INVOLVED

The respondent submits that the questions involved on this application for *certiorari* are as follows:

1. Where petitioners raise constitutional issues on their trial in State Court and these issues are reviewable by the highest appellate Court of the State as a matter of right, and where petitioners fail to meet the conditions required by law for perfecting their appeal, have they exhausted all available State remedies as required by 28 U.S.C., § 2254?

2. Where petitioners, on their trial in State Court, challenge the Grand Jury and Petit Jury, alleging that Negroes have been excluded by reason of race and color, and the State Court determines this issue adversely to the petitioners, can this constitutional issue again be retried in a *habeas corpus* proceeding in the Federal District Court?

3. Where, upon trial of petitioners in State Court, a confession is admitted in evidence over petitioners' objection that the same was involuntary and extorted by fear and physical force in violation of the Constitution, can the

petitioners have this same constitutional issue again retried and redetermined in a *habeas corpus* proceeding in the Federal District Court?

4. Where petitioners have been tried in a State Court in a criminal case, and the trial judge instructs the jury according to local State practice, can the petitioners challenge the correctness of the trial judge's instructions to the jury in a *habeas corpus* proceeding in the Federal District Court?

5. Where petitioners are convicted in a criminal case in a State Court and have an absolute and unqualified right to appeal to the highest appellate Court in the State for a review of the alleged errors assigned in their case and petitioners fail to perfect their appeal and meet the conditions upon which the State grants such an appeal, can petitioners assert in a *habeas corpus* proceeding in the Federal District Court that they were unconstitutionally deprived of their right of appeal?

6. Are the petitioners in this case seeking to use a *habeas corpus* proceeding as a substitute for an appeal?

FACTS

The respondent desires to refer to and incorporate by reference in this brief the brief filed by respondent in the United States Court of Appeals for the Fourth Circuit, and the same number of copies of respondent's brief filed in the Circuit Court of Appeals is also filed in this Court. As to the narrative of events surrounding the murder of William Benjamin O'Neal, we again state our contentions as to the facts which we laid before the Circuit Court of Appeals, as follows:

The petitioners, Bennie Daniels and Lloyd Ray Daniels, two young colored men residing in Pitt County, were seen in the Town of Greenville on the 5th of February, 1949. Bennie Daniels was armed with a knife and engaged in an altercation with the witness, James Henry Riddick. (S.Tr. Vol. 1, p. 169) After this incident, the petitioners, according to the witness, Charlie Moore, engaged in fighting in the street between nine and ten o'clock with some other

colored boys, and Bennie Daniels was again observed with a knife. There was some blood on the clothing of the petitioners. (S.Tr. Vol. 1, p. 176) At a later hour, the petitioners tried to engage the services of a taxicab from the witness, Leslie Manning, who refused to carry the petitioners in his cab. (S.Tr. Vol. 1, p. 180) The petitioners were seen by another taxicab driver, Norman Tripp, somewhere between nine and ten o'clock that night to get into the taxicab of William Benjamin O'Neal. O'Neal's taxicab was parked close to the cab of the witness. O'Neal was over talking to somebody when the petitioners got into his cab. This witness observed O'Neal get into his cab, where the petitioners were already seated and drive off in the direction of Grimesland. (S.Tr. Vol. 1, p. 182) The witness Tripp identified the petitioners from pictures shown to him by the Sheriff.

The body of William Benjamin O'Neal was found Sunday morning, February 6, 1949, at a place some miles from the Town of Greenville, near some tobacco barns located just off of a country road, by the witness, Leroy Smith. (S.Tr. Vol. 2, p. 341) Smith reported the incident to the witness Baker, who called the Sheriff of the County. (S.Tr. Vol. 2, p. 349) The place showed signs of a struggle, the door of the taxicab was open, and beside the door was an overcoat. The driving license of O'Neal was found two or three feet from the cab. The glove compartment of the cab was open, and an empty billfold was found. The taxicab permit of O'Neal was also found, with his picture attached, and also some papers with a Social Security number. O'Neal's head was crushed, his throat had been cut, and, in fact, his whole body was cut, crushed and beaten all over. Around his body were found some fifty tobacco sticks, some of which had been broken and had blood on them; and there were two bricks found near the body that had blood on them. The account of Sheriff Tyson as to what he found at the scene of the crime will be found in S.Tr. Vol. 1, p. 193. The account of Chief of Police L. D. Page will be found in S.Tr. Vol. 2, p. 306. The account of S. G. Gibbs as to the condition of O'Neal's body and the

scene of the crime will be found in S.Tr. Vol. 2, p. 357. The account of Captain S. B. Dorsey, witness for the State, as to what he found at the scene of the crime will be found in S.Tr. Vol. 2, p. 430. Other peace officers and witnesses also testified and were in substantial agreement as to what was found, although some witnesses observed things that other witnesses did not. Both new and used rubber contraceptives were found at the scene of the crime, indicating that the spot had been used as a place of assignation, but there is no evidence in the record of the race of the people who used this isolated spot for such purposes. After Bennie Daniels was arrested, he was searched and rubber contraceptives were found in his watch pocket. (S.Tr. Vol. 2, pp. 385, 441)

The overcoat found at the scene of the crime was identified as a coat belonging to William Benjamin O'Neal, the identification being made by his mother (S.Tr. Vol. 2, p. 325) and also by the witness, J. W. Phillips, who sold the overcoat to O'Neal. (S.Tr. Vol. 2, p. 356) A woman's glove had been found at the scene of the crime near the taxicab, and it was shown by the witness Faulkner that he had driven this taxicab before O'Neal had ever driven the cab and that this glove was in the taxicab when the witness Faulkner started driving the same. (S.Tr. Vol. 2, p. 353) It was also shown by the witness, J. W. Phillips, that he owned the taxicab that O'Neal was last seen driving and that this lady's glove was in the compartment of the taxicab and had been there for two months. (S.Tr. Vol. 2, p. 355) From the testimony of these witnesses, it appears that the glove had been in the taxicab for some time before O'Neal became the driver.

Upon information received by the officers and not disclosed in the record, Lloyd Ray Daniels was arrested on the following Monday morning between one and one-thirty o'clock in a tenant house on the L. O. Whitehurst farm. The house was occupied by a man by the name of Wilkes. He was found lying on a bed or cot, fully dressed, with his shoes on and all his clothes except his hat. Some cold blood was found on the back of his left ear, and there were

scratches around and under his neck and some small cuts on his hands. (S.Tr. Vol. 1, pp. 199-200) There were several officers present at this arrest, but Lloyd Ray Daniels was placed in an automobile and taken to Williamston, over in Martin County, which is a county that adjoins Pitt County. In this automobile with Lloyd Ray Daniels were Sheriff Tyson, Deputy Sheriff Manning, and S. G. Gibbs, a highway patrolman, who is now a member of the State Bureau of Investigation. See also Gibbs' testimony in S.Tr. Vol. 2, p. 357. On the way to Williamston, according to the testimony of the officers, Lloyd Ray Daniels made a statement (S.Tr. Vol. 2, p. 261) in which he admitted that he participated in killing O'Neal and gave some details of the murder. He was carried to Williamston and placed in the Martin County Jail.

The petitioner, Bennie Daniels, was arrested between five and six o'clock on Tuesday morning about a mile and a half east of the Town of Winterville on the Bryan Tripp farm. He was arrested by the Sheriff of the County, Patrolman Gibbs, and Ray Smith, a fireman. (S.Tr. Vol. 1, pp. 215, 219) The petitioner, Dennie Daniels, was placed in an automobile and carried also to Williamston, where he was placed in jail. On the way, according to testimony of the officers, Bennie Daniels admitted that he had participated in the killing of O'Neal. (S.Tr. Vol. 2, pp. 355-356) Later, on Tuesday night, on the 8th day of February, 1949, according to the evidence of the peace officers, the petitioners were both questioned in the jail at Williamston, and written confessions were made, which were signed by Bennie Daniels and were also signed by Lloyd Ray Daniels by his mark. These written confessions appear in S.Tr. Vol. 1, pp. 273 and 276. When Bennie Daniels was arrested on the Bryan Tripp farm, he was standing behind the door, fully dressed. (S.Tr. Vol. 1, p. 270) These various confessions on the part of the petitioners were used by the State in evidence. See S.Tr. Vol. 1, pp. 273-276, Exhibit 8, pp. 276-278, Exhibit 9, pp. 363-364, Exhibit 32. Further evidence on the confessions will be found in S.Tr. Vol. 1, pp. 284, 389, 391, 216, 219, 258, 259, 271, 366, 383-384. From the

above references to the transcript of evidence, it will also be seen that the petitioners denied killing O'Neal and contended that whatever statements they made were induced by fear and coercion and that they did not, in fact, admit killing O'Neal. Evidence as to the voluntariness of the confessions was introduced by both the State and the petitioners which is according to the practice in North Carolina in passing on confessions, and the Court found that the confessions were made freely and voluntarily. (S.Tr. Vol. 1, p. 268) As to the manner in which the confessions were obtained, see App. pp. 50-98, brief of respondent filed in the Circuit Court of Appeals, No. 6330.

When petitioner, Lloyd Ray Daniels, was at the State Hospital at Goldsboro, he was visited by a white man who had known him for eight or ten years. Petitioner, Lloyd Ray Daniels, told this white man about how they murdered O'Neal. The white man asked G. M. Johnson, a social worker at the hospital, to sit in on the interview and have Lloyd Ray Daniels repeat what he had already told as to the murder. There certainly was no coercion, threats or physical force used in this interview, and none has ever been shown. It should be pointed out that the State only learned of this confession during the hearing held on the *habeas corpus* at Tarboro, North Carolina. This confession was, therefore, not used at the trial. We quote Lloyd Ray Daniels' narrative of the murder as told to the social worker as follows:

> "This white man, after talking with patient at the Criminal Building, ask that Interviewer sit in and have patient repeat what he had just heard him say. Patient calmly related the following:
> "He claims that he got up with Bennie Daniels and Bennie's brother on Saturday afternoon before the murder that night. They drank one pint of liquor and later drank some beer. Lloyd Ray knowing that he only had twenty-five cents in his pocket, advised these boys that he could not go with them. Bennie advised him to leave everything to him, advising that he would look after all the incidentals. It seems that patient repeatedly attempted to explain that he could not go with them but after their insisting he always did so. Bennie bought a new knife before their getting in a

taxi near the bus station. They rode approximately six miles from Greenville to a side road near which were three tobacco barns. The taxi was ordered to circle around and apparently come back on the road. Lloyd Ray sat to the right of the driver, Bennie being directly behind him in the back seat. After getting off the road, near the tobacco barns, Bennie surrounded the driver with out-stretched arms, the sharp knife facing his throat. Lloyd Ray, realizing what was happening, again stated that he did not wish to follow Bennie. The driver's throat was apparently cut before they got him on the left side of the car, where Lloyd Ray was knocked down by the driver.

"Lloyd Ray states that he started to run but was immediately tripped by Bennie, who explained what had happened, advising that patient was then as guilty as he. Neither one could denie what they had already done.

"Lloyd Ray admits that he used tobacco sticks on the driver's body. He claims that it was then around eleven o'clock. They reached his mother's home about twelve o'clock midnight. They apparently remained there until two A. M., when it was claimed that they went back to the tobacco barns, then returned home where they slept until early morning when they got up and played marbles in the yard until ten A. M.

"Lloyd Ray claims that he would have never done such a thing had it not been for Bennie who led him astray this particular night.

"This white man states that the tobacco barn was bloody inside where they apparently tried to hang the driver, but hearing his voice afterwards, it is assumed that they took him from the hanging position and dragged him outside and beat his head approximately four inches in the earth. Bennie and Lloyd Ray's clothes were bloody in front as if they held the driver up and attempted to carry him in their arms. Their clothes were found the following morning at Lloyd Ray's home. No one knew about the incident until Lloyd Ray's sister, who is a maid for someone near by, advised that she could not go to work that day because of having to wash Lloyd Ray's and Bennie's clothes. Upon immediate investigation, the clothes were found but the two boys were not located immediately.

"Lloyd Ray was found at his girl friend's house about two A.M. the following Monday morning. Bennie came

to his first cousin's house the following Tuesday morning and those living in the house informed this white man of Bennie's presence. The law "surrounded the house" and immediately took him into custody. It seems that these boys readily informed the Sheriff of what had happened and while being carried to Raleigh, they laughed at each other about the incident, advising that one was as guilty as the other."

ARGUMENT

This case was before this Court at the October Term, 1949, No. 412, Mics., and as we have pointed out before, this Court denied *certiorari*. At that time, counsel for the respondent, in their brief, made a statement that the petitioners still had a remedy in the State Court if they would file a proper and sufficient petition for writ of error *coram nobis*. This statement is quoted by petitioners on p. 12 of their brief filed in this case. This statement was made in good faith because we thought that the first application of petitioners to the Supreme Court of North Carolina for a writ of error *coram nobis* had been dismissed because of procedural defects relating to an insufficiency of the petition rather than any defect of a substantial nature. It is apparent, however, that counsel for petitioners disagreed with this statement because in their brief filed at the October Term, 1949, No. 412, Misc., they stated in a footnote as follows:

> "It is dubious whether the suggestion of the Supreme Court afforded petitioners any real prospect of relief. The writ of error *coram nobis* is available where reliance is placed upon matter *de hors* the original record (*In re Taylor*, 229 N. C. 297, 49 S.E. 2nd 749; *id.*, 230 N. C. 566, 53 S.E. 2d 857; cf. *Taylor v. Alabama*, 335 U. S. 252; *Hysler v. Florida*, 315 U. S. 411), whereas the Federal questions here raised by petitioners involved matters in the record of the trial proceedings."

Later on, counsel filed a reply brief at the October Term, 1949, in this same case, No. 412, Misc., and in this reply brief, counsel for the petitioners stated as follows:

Respondent suggests that there is available to Petitioners further recourse to the Supreme Court of North Carolina and, therefore, that this petition is premature (Res. Br., pp. 27-28). According to Respondent, Petitioners could re-apply for writ of error *coram nobis* before the Supreme Court of North Carolina. The premise of Respondent's argument is, apparently, that the prior application was deemed insufficient for procedural rather than substantive reasons, and that a subsequent reapplication could cure the procedural error committed.* Irrespective of whether any such further recourse to the Supreme Court of North Carolina is available, it is clear that the judgment before this Court on this petition is a final judgment within the meaning of and reviewable under Title 28, Section 1257 (3) of the United States Code. The fact that the highest court of the State may reconsider or review its own judgment does not alter the circumstance that a judgment which finally decides and determines the rights of the litigants is reviewable by this Court. Such a judgment is final for the purposes of Section 1257 (3) so long as it is 'subject to no further review or correction in any *other* State tribunal . . . . finality is not deterred by the existence of a latent power in the rendering Court to reopen or revise its judgment.' *Market St. R. Co. v. Railroad Commission of California*, 324 U. S. 548, 551 (Emphasis added); *Southern Railway Co. v. Clift*, 260 U. S. 316; *Rio Grande Western R. Co. v. Stringham*, 239 U. S. 44; see also *Largent v. Texas*, 318 U. S. 418, 421-422.

"Petitioners call to the attention of the Court the fact that the Order of Mr. Chief Justice VINSON herein, dated January 31, 1950, extending their time to file their petition for writ of certiorari was upon an application for an extension of time to file such a petition to the Supreme Court of North Carolina *and/or* the Superior Court of Pitt County. Consequently, while it may appear that the Supreme Court of North Carolina has passed upon the merits of the Federal questions here involved and that, therefore, those questions are before this Court upon the instant petition for a writ of certiorari to the North Carolina Supreme Court, in the event that this Court concludes that the Supreme Court of North Carolina declined to review and did not review those Federal questions upon the merits, then the judgment of the Superior Court on the merits of the Federal questions here involved should be deem-

ed to be before this Court as the 'judgment rendered by the highest court of a State in which a decision could be had' (28 U. S. C. A. § 1257) and this Court may now review that judgment of the Superior Court. *Virginia Ry. Co. v. Mullens*, 271 U. S. 220; *Norfolk, etc., Turnpike Co. v. Virginia*, 225 U. S. 264; *Western Union Tel. Co. v. Hughes*, 203 U. S. 505."

"*The Supreme Court of North Carolina in denying the application for writ of error *coram nobis* stated that 'their petition does not make *prima facie* showing of substance which is necessary to bring themselves within the purview of the writ'."

It is clear, therefore, that both positions were before this Court at that time and also because the dissenting Circuit Judge, in his opinion, seems to think that this Court relied heavily on our statement. The statement was made in good faith, but subsequently proved to be wrong because the Supreme Court of North Carolina dismissed a second application for a writ of error *coram nobis* filed by petitioners upon the ground that no substantial showing had been made which entitled petitioners to such relief. We, of course, do not know why this Court denied *certiorari* at that time, but we thought we would lay before this Court the whole story on this point.

I.

PETITIONERS HAVE FAILED TO EXHAUST AVAILABLE REMEDIES IN THE STATE COURTS AS REQUIRED BY 28 U.S.C. § 2254, BY FAILURE TO PERFECT THEIR APPEAL TO THE SUPREME COURT OF THE STATE WHICH COULD HAVE REVIEWED ALL CONSTITUTIONAL ISSUES RAISED BY PETITIONERS IN THEIR TRIAL AND BY FAILURE TO APPLY TO THE UNITED STATES SUPREME COURT FOR CERTORARI AFTER DISMISSAL OF SECOND APPLICATION FOR CORAM NOBIS, CANNOT NOW USE THE PROCESS OF HABEAS CORPUS AS A COLLATERAL ATTACK ON THE STATE TRIAL OR AS A SUBSTITUTE FOR AN APPEAL.

We quote 28 U.S.C., § 2254, as follows:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
> "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Petitioners failed to serve statement of case on appeal within the time required by State law, and the trial judge struck out the case on appeal by order after hearing. (See Order, appellee's brief C.C.A. 4, App., p. 99.) See STATE v. DANIELS, 231 N. C. 17, 56 S.E. (2d) 2. In North Carolina, petitioners had an unconditional right (§ 15-180 of the General Statutes) to appeal to the Supreme Court. The Supreme Court of North Carolina reviews constitutional questions relating to racial discrimination in the composition of grand juries and petit juries (STATE v. SPELLER, 229 N. C. 47, S.E. (2d) 537; STATE v. PEOPLES, 131 N. C. 784, 42 S.E. 814) and issues as to the constitutionality of the admission of confessions (STATE v. BROWN, 231 N. C. 152, 56 S.E. (2d) 441; STATE v. BROWN, 233 N. C. 202, 63 S.E. (2d) 99) are passed on by the Supreme Court. For other State cases on jury discrimination and confessions, see appelle's brief C.C.A. 4, No. 6330, p. 10. Petitioners' remedy by appeal was adequate, and petitioners' counsel—who were also counsel for Speller and obtained two new trials in that case—knew how to perfect appeals to the Supreme Court of North Carolina. See STATE v. SPELLER, 229, N. C. 67; 47 S.E. (2d) 537; STATE v. SPELLER, 230 N. C. 345, 53 S.E. (2d) 294.

It is admitted that there have been cases of exceptional circumstances of peculiar urgency (MOORE v. DEMPSEY, 261 U. S. 86, 67 L.ed 543) where adequate process existed but was ineffective to protect the rights of prisoners. The

right of appeal—no matter how adequate and comprehensive the scope of review—would be a legal chimera without the guiding hand of counsel (WILLIAMS v. KAISER, 323 U. S. 471, 89 L.ed. 398) to render the appeal effective. None of these exceptions exists in the present case unless the principle is adopted that exceptional circumstances exist justifying the issuance of habeas corpus in all cases of prisoners sentenced to death. We do not believe such a rule exists, but if it does, then such logic approaches the limits of Federal review of all cases where persons are sentenced to death in State Courts.

Petitioners contend that "there is presently not available to petitioners any remedy or procedure in the aforesaid state courts," and they are, therefore, entitled to relief in the Federal Courts. In other words, any petitioner, where he has available an adequate review upon conditions fixed by the State, can fail to meet these conditions or simply wait until time limitations expire and then say his present status as to exhaustion of remedies must prevail. He need not go to the trouble and expense of an available appeal; all he has to do is to fail to perfect the appeal for any reason. It is true that petitioners were only one day late in serving statement of case on appeal, but the time element does not answer the question. The State fixes the same appeal procedure for all people of all races, and the fact that petitioners belong to the colored race does not give them preferential treatment in appeals or discriminations in their favor. The time factor in perfecting appeals in nearly all States is a fixed measure and is not governed by approximations or a process of relativity. To adopt the "presently available remedy" theory of counsel for petitioners would completely destroy Title 28, U.S.C., § 2254, and would be an evasion of its plain words.

After this Court denied *certiorari* (October Term, 1949—No. 412, Misc.), petitioners applied to the Supreme Court of North Carolina for another writ of error *coram nobis* (STATE v. DANIELS, 232 N. C. 196, 59 S.E. (2d) 430) which was dismissed. The petitioners should then have applied to this Court for a *certiorari*, and this is another

instance of failing to exhaust an available remedy. If application had been made to this Court for *certiorari*, then irrespective of a decision on a non-Federal question—it being then known that *coram nobis* was not available—this Court would have had an opportunity to say whether or not North Carolina had furnished petitioners sufficient effective process. This fact was noted by the Circuit Court of Appeals (DANIELS v. ALLEN, No. 6330, C.C.A. 4, ... F. (2d) .....) for the opinion states: "No application for *certiorari* was made to the Supreme Court of the United States to review this decision" (second *coram nobis* decision). In a footnote to this opinion (C.C.A. 4), the Court said:

> 'It (Supreme Court of North Carolina) had before it the fact that the question (jury discrimination) had been raised in this case; for the record shows that the case on appeal which had been stricken by the trial judge was attached to the application made for *certiorari* to bring it up as a part of the record."

While it is stated in the opinion of the Court below (C.C.A. 4) that the question is not one of exhausting State remedies as a prerequisite to the writ, but it is the use of *habeas corpus* in lieu of an appeal; it is pointed out that to allow such a substitute of an appeal would permit a lower Federal Court to review decisions of a State Court of coordinate jurisdiction instead of requiring the orderly process of appeal to the Supreme Court of the State with application to the Supreme Court of the United States for *certiorari* be followed. The right of review was provided by State practice and was lost by failure to comply with the reasonable rules of the State Court, which cannot be invalidated or waived by the Federal Courts.

The quotation of petitioners on p. 45 of their brief from MOONEY v. HOLOHAN, 294 U.S. 103, 79 L. ed. 791, is perverted by petitioners into a misleading conclusion. Petitioners are trying to make good the proposition that "the exhaustion requirement applies only to those remedies available at the time the petition for Federal *habeas corpus* is filed." They lift out of context the statement of this

Court in the MOONEY case that before Federal *habeas corpus* can issue, "recourse should be had to whatever judicial remedy afforded by the State may still remain open." When we look at the case, we find that Mooney alleged a conviction in a State Court on perjured evidence known to be so by the prosecuting officers. The State had corrective process by State *habeas corpus* which permitted the examination of constitutional questions. Mooney had not sought this State writ on these precise grounds, and it was still open to him. Up to that time, Mooney had availed himself of all State remedies except this one—he did not fail to perfect his appeal to the Supreme Court of California—and thus we see petitioners' argument fails; the "may still remain open" was applicable to a remedy still in existence, and the case is authority for our position.

The petitioners quote from (petitioners' brief, p. 34) and rely upon an article in Harvard Law Review (61 Harvard Law Review 657—The Freedom Writ). As to exhaustion of remedies, we desire to rely upon the same article, and we quote (p. 666):

> "'Exhaustion' may, however, connote a more extreme requirement than that of no other presently available remedy. It may mean that federal habeas corpus is not to issue unless the petitioner invoked within the proper time every remedy which was ever available to him, even though such untried remedies are no longer available. This application of the exhaustion principle may find justification in the theory that there has been no Fifth or Fourteenth Amendment due process denial when available federal or state processes were not invoked. There are court indications that 'exhaustion' has the extreme meaning here suggested. In the Sunal case (Sunal v. Large, 332 U. S. 174, 91 L. ed. 1982), the court discussion of 'exceptional circumstances' indicated that its normal exhaustion rule would not permit federal habeas corpus where appeal had not been sought, though appeal was no longer available." (Parenthetical matter ours—footnotes not quoted)

It appears that Title 28, U.S.C., § 2254 is but a statutory expression of the rationale of previously decided cases on

this subject. Judge Parker who wrote the opinion of the Court below, and who also served as Chairman of the Judicial Conference Committee on Habeas Corpus Procedure, in an Article (Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171) states:

> "The provisions of the Revised Code with respect to Habeas Corpus are very largely a mere codification of the best practice already worked out by Court decisions."

Title 28, U.S.C., § 2254 became effective June 25, 1948; the case of YOUNG v. RAGEN, 337 U.S. 235, 93 L. ed. 1333, was decided June 6, 1949, and this Court in footnote 1 states:

> "Existing law as declared by Ex Parte Hawk was made a part of the statute by the new judicial code 28 U.S.C. 1948 ed. Sec. 2254 * * *."

This point—failure to exhaust an adequate appeal—has been already decided against petitioners:

> SUNAL v. LARGE, 332 U. S. 174, 91 L. ed. 1982
> RIDDLE v. DYCHE, 262 U. S. 333, 67 L. ed. 1009
> EX PARTE HAWK, 321 U. S. 114, 88 L. ed. 572
> GLASGLOW v. MOYER, 225 U. S. 420, 56 L. ed. 1147
> WOOLSEY v. BEST, 299 U. S. 1, 81 L. ed. 3
> YOUNG v. RAGEN, 337 U. S. 235, 93 L. ed. 1333
> GOTO v. LANE, 265 U. S. 393, 68 L. ed. 1070
> See cases cited Brief p. 11, C.C.A. 4, No. 6330.

In the case of GOTO v. LANE, 265 U. S. 393, 68 L. ed. 1070, the Court had before it an appeal from a judgment of the District Court of Hawaii refusing a writ of *habeas corpus* sought by thirteen persons convicted in a territorial Circuit Court. They attempted to raise certain constitutional questions about the indictment and other particulars. It appeared, however, that the petitioners could have sought a review on a writ of error and could have had these same questions reviewed by an appellate Court but that they allowed their time to expire and thereby lost the opportunity to resort to this remedy. In disposing of the

question and affirming the dismissal of the *habeas corpus*, the Supreme Court of the United State said:

> "This case does not measure up to that test. The circuit court in which the petitioners were tried and convicted undoubtedly had jurisdiction of the subject matter and of their persons, and the sentence imposed was not in excess of its power. The offense charged was neither colorless nor an impossible one under the law. The construction to be put on the indictment, its sufficiency, and the effect to be given to the stipulation, were all matters the determination of which rested primarily with that court. If it erred in determining them, its judgment was not, for that reason, void (Ex parte Watkins, 3 Pet. 193, 203, 7 L. ed. 650 653; Ex parte Parks, 93 U. S. 18, 20, 23 L. ed. 787, 788; Ex parte Yarbrough, 110 U. S. 651, 654, 28 L. ed. 274, 275, 4 Sup. Ct. Rep. 152), but subject to correction in regular course on writ of error. *If the questions presented involved the application of constitutional principles, that alone did not alter the rule.* Markuson v. Boucher, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76. *And if the petitioners permitted the time within which a review on writ of error might be obtained to elapse, and thereby lost the opportunity for such a review, that gave no right to resort to habeas corpus as a substitute.* Riddle v. Dyche, 262 U. S. 333, 67 L. ed. 1009, 43 Sup. Ct. Rep. 555. And see Craig v. Hecht, 263 U. S. 255, ante, 293, 44 Sup. Ct. Rep. 103." (Emphasis supplied)

The case of GOTO v. LANE, *supra*, has been cited and approved various times by the Supreme Court of the United States, the latest reference appearing in the case of SUNAL v. LARGE, 332 U. S. 174, 91 L. ed. 1982. The case is also approved by a Circuit Court of Appeals in the case of BIDDLE v. HAYES, 8 Cir., 8 Fed. (2d) 937. The same case has also been approved in the case of U. S. EX REL. GEISE v. CHAMBERLAIN, 7 Cir., 184 Fed. (2d) 404 (Adv. Op. No. 4 in Federal Report).

We will quote from a few of these cases decided by Circuit Courts of Appeal in order to show the Court that the rule followed by the various Courts of Appeal is the same rule followed by the case of GOTO v. LANE, *supra*, in the Supreme Court of the United State.

In the case of WASHINGTON v. SMYTH, 4 Cir., 167 Fed. (2d) 659, the Court said:

> "Petitioner is now being held in the Virginia State Penitentiary as a result of two convictions in the Corporation Court of the City of Newport News, Virginia. No attempt has been made by petitioner to secure a writ of habeas corpus from any court of the State of Virginia.
> "It has frequently been held that the availability of the writ of habeas corpus in a federal court on behalf of one held in the custody of a State depends upon the exhaustion of State remedies when these are adequate and available. White v. Ragen, 324 U. S., 760, 65 S. Ct. 978, 89 L. ed. 1348; Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340, 79 L. ed. 791, 98 A.L.R. 406."

In the case of U. S. EX REL. CARR v. MARTIN 2, Cir., 172 Fed. (2d) 519, 520, the Court said:

> "It appears, however, that in 1947 his conviction in Pennsylvania was reviewed in the courts of that state upon his application for a writ of error coram nobis and that when relief was denied he took no appeal, though he unsuccessfully applied for leave to appeal as a poor person. Moreover, there is no showing that he took any appeal from his original conviction in Pennsylvania. * * *
> "The district court had no jurisdiction to sit in review of claimed errors in the state courts. The relator's remedy was by appeal in the state courts, and his application to the court below for a writ of habeas corpus is not a substitue for that remedy."

In the case of McGUIRE v. HUNTER, 10 Cir., 138 Fed. (2d) 379, the petitioners' attorney failed to perfect their appeal, and it was held that this was not grounds for the issuance of a writ of *habeas corpus*. The Court, in its opinion on this point, said:

> "As a further ground for the issuance of the writ, it is contended that petitioner instructed his attorney to appeal the criminal case and that he failed to do so. But an appeal is not a necessary element of due process, and it is not incumbent upon the trial court in a criminal case to see that the attorney for the defendant perfects an appeal. *Therefore the failure of*

the attorney in this instance to take the requisite steps to appeal the case does not warrant the discharge of petitioner on habeas corpus. Errington v. Hudspeth, 10 Cir., 110 F.2d 384, 127 A.L.R. 1467; McDonald v. Hudspeth, 10 Cir., 129 F.2d 196." (Emphasis supplied)

In the case of SCHECHTMAN v. FOSTER, 2 Cir., 172 Fed. (2d) 339, the petitioner had been denied leave to appeal in forma pauperis and did not press his appeal to a conclusion, and it was held that he was not entitled to *habeas corpus*, and on this point, the Court said:

"This is not, however, the full measure of the obstacles which stood in the path of habeas corpus in the District Court, because, although no right of appeal was necessary, since there was one, it was necessary that Schechtman before resorting to a federal court should exhaust all his remedies in the state court, including the right of appeal which did exist in 1948. Although he did invoke that right, *he did not press it to a conclusion;* so that, prima facie, he did not exhaust his remedies. His excuse is that the Appellate Division denied him leave to proceed in forma pauperis; but he must show that the denial was itself a denial of due process of law. This he has not done. We do not know why the Appellate Division denied leave. It may have been because they did not think that he had made an adequate showing of his poverty; it may have been because they themselves examined the evidence which he had presented to the trial court, and satisfied themselves that there was no reasonable chance of his success, because it did not make out a prima facie case of the deliberate use of perjured testimony." (Emphasis supplied)

In the case of U. S. EX REL. STEELE v. JACKSON, 2 Cir., 171 Fed. (2d) 432, 433, the Court said:

"But if the facts, on which the relator relies to show the subornation of witnesses, came to his knowledge too late to be used by the statutory remedies, the decision was apparently wrong, pro tanto. Even so, his relief was by appeal from the order; and he may not apply to a federal court as a substitute for such an appeal. Moreover, he may not do so, if he did appeal and was unsuccessful; for district courts do not sit to review errors which state courts, high or low, may

make in the administration of their own remedies provided those remedies gives 'due process of law.' The possibility that any court in any country may be mistaken is part of the burden of the administration of justice; there must be an end to the hierarchy of appeals."

In the case of BERKOFF v. HUMPHREY, 8 Cir., 159 Fed. (2d) 5, 7, the Court said:

"A defendant must follow the regular course of criminal proceedings and exhaust the ordinary remedies afforded him before he may resort to habeas corpus, even though he attacks the constitutionality of the statute under which he was indicted. Johnson v. Hoy, 227 U. S. 245, 247, 33 S.Ct. 240, 57 L. Ed. 497; Glasgow v. Moyer, 225 U. S. 420, 428, 429, 32 S.Ct. 753, 56 L. Ed. 1147. The hearing on habeas corpus is not in the nature of an appeal nor is it a substitute for the functions of the trial court. This is true as to controverted issues of fact and as to disputed issues of law 'whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. These and all other controverted matters of law and fact are for the determination of the trial court.' Henry v. Henkel, 235 U. S. 219, 229, 35 S.Ct. 54, 57, 59 L. Ed. 203. 'It is fundamental that a court upon which is conferred jurisdiction to try an offense has jurisdiction to determine whether or not that offense is charge or proved. Otherwise every judgment of conviction would be subject to collateral attack and review on habeas corpus on the ground that no offense was charged or proved." Knewel v. Egan, 268 U. S. 442, 446, 45 S.Ct. 522, 524, 69 L. Ed. 1036."

In the case of SCHLDER v. GUSIK, 6 Cir., 180 Fed. (2d) 662, 775, the Court said:

"Finally, the appellee urges that we may not consider the question of exhaustion of remedies because that issue was not raised either in the pleading or upon hearing below. We reject the argument. Exhaustion of remedies, while not precisely jurisdictional to the consideration of a petition for habeas corpus, nevertheless involves a concept of broad judicial policy stemming from the concern of federal courts to preserve the delicate balance of authority between the state and federal judiciary, between courts and administrative

agencies, and between civil and military courts. So viewing it we think reviewing courts are required to apply the doctrine of exhaustion of remedies whether an issue in respect to it was raised below or not. Only so may there be consistency of decision and the balance of authority maintained."

In the case of U. S. EX REL. RHEIM v. FOSTER, 2 Cir., 175 Fed. (2d) 772, 773, the Court said:

"An examination of the record has convinced each of us that application for a certificate of probable cause should be denied. The applicant was convicted in 1928 of murder in the second degree. He was represented in that trial by competent counsel. The errors therein which he now asserts do not appear to be such as deprived him of any constitutional right but; if they did, his remedy was by appeal from the judgment of conviction. Failure to avail himself of that remedy precludes resort to habeas corpus in a federal court, in the absence of exceptional circumstances, which are not shown in the present case. 28 U.S.C.A. § 2254. The same is true with respect to the state Court's denial of his coram nobis proceeding; and the fact that poverty has precluded prosecuting an appeal from that order does not enlarge his right to a federal habeas corpus. United States v. Tyler, 269 U. S. 13, 19, 46 S.Ct. 1, 70 L.Ed. 138."

In the case of NESBIT v. HERT, D.C. Indiana, 91 Fed. Rep. 123, 125, 126, the Court said:

"If the petitioner has neglected to appeal to the supreme court of the state for relief from the alleged wrongful sentence, until he has lost the right to take such appeal, he is in no situation to invoke the aid of this court to relieve him from the consequences of his negligence."

See also:

DARR v. BURFORD, 339 U. S. 200, 94 L. ed. 761
Annotation: 94 L. ed. 785
SANDERLIN v. SMYTH, 138 F. (2d) 729, 730 (C.C.A. 4)
U. S. EX REL. FEELEY v. RAGEN, 166 F. (2d) 976, 981 (C.C.A. 7)
MARKUSON v. BOUCHER, 175 U. S. 184, 185

Finally, it is contended by petitioners that they attempted to appeal, and, therefore, they have met the conditions of the statute (Title 28, U.S.C., §. 2254) and have exhausted their remedy of appeal. There is implicit in this contention a claim of substantial compliance. This is a bizzare and strange contention in view of the language of the statute. The language is written in the past tense "has exhausted," which contemplates completed action. The concept of "exhaustion" is "to bring out or develop completely." The fact remains that the statute does not deal with approximations or attempts. The statute itself is a full answer to such a contention.

We assert that since the enactment of Title 28, U.S.C., § 2254, petitioners have no standing in the Federal Courts on *habeas corpus* unless State appeal is exhausted or unusual circumstances of peculiar urgency are shown.

The cases cited by petitioners as justifying *habeas corpus* without exhaustion of appellate remedies are either cases that originated in the Federal Courts or the Court originally had no jurisdiction over the person or subjectmatter, or exceeded its authority in rendering judgment.

The case of EX PARTE LANGE, 85 U. S. 163, 21 L. ed. 872, came to this Court on *habeas corpus* and *certiorari*. The prisoner having complied with one judgment, the lower Court had no right to strike it out and impose another judgment.

The case of IN RE SNOW, 120 U. S. 274, 30 L. ed. 658, the want of jurisdiction appeared on the face of the record, and under the Federal statute, the defendant had a right to appeal upon refusal to issue *habeas corpus*. This case arose in a lower Federal Court.

The case of EX PARTE WILSON, 114 U. S. 417, 29 L. ed. 89, arose in lower Federal Court, decided that the writ should issue because prisoner had been tried and sentenced for an infamous offense with indictment or presentment of Grand Jury which deprived the Court of jurisdiction.

The case of EX PARTE BAIN, 121 U. S. 1, 30 L. ed. 849, arose in a lower Federal Court, and it was decided the

Court had no jurisdiction because an amendment to the indictment had not been re-submitted to the Grand Jury.

In the case of CALLAN v. WILSON, 127 U. S. 540, 32 L. ed. 223, the petitioner was deprived of a jury trial in the Police Court of the District of Columbia. This case came to this Court on an appeal, and procedural questions as to *habeas corpus* were not discussed.

In the case of JOHNSTON v. ZERBST, 304 U. S. 458, 82 L. ed. 1461, the prisoner was convicted in the District Court of the United States, and it was decided that he had not waived his right to counsel, and assistance of counsel being a constitutional requirement in the Federal Court, the same was reviewable by *habeas corpus*. The case was decided in 1938, and there was no statute saying that appellate remedies must be exhausted as there is now applicable to State trials. The same is true as to the case of WALKER v. JOHNSTON, 312 U. S. 275, 85 L. ed. 830, which was a case of deprivation of counsel. In WALEY v. JOHNSTON, 316 U. S. 101, 86 L. ed. 1302, the case arose in the Federal Court and it appeared that the prisoner had entered a plea of guilty because of coercion by a F.B.I. agent. The government confessed error. The case of BOWEN v. JOHNSTON, 306 U. S. 19, 83 L. ed. 455 involved the jurisdiction of the State Court and Federal Court as to national park lands. It was decided on the principle of exceptional circumstances.

The case of U. S. EX REL. AULD v. WARDEN OF NEW JERSEY STATE PENITENTIARY, 187 F. (2d) 615 is greatly relied upon by petitioners. This case does state that a sentence of death plus the absence of the right to review by *habeas corpus* in the New Jersey Courts would constitute extraordinary circumstances, and the writer of the opinion further states that there are decisions of this Court to sustain his view, but he does not cite the cases. This discussion is plainly collateral to the primary point in the case because the Court disposed of the case on the merits and decided that Auld was not entitled to the writ of *habeas corpus*. The concurring opinion of Circuit Judge Hastie calls attention to the fact that there was no need

of passing upon the problem of extraordinary circumstances.

II.

THE CONSTITUTIONAL ISSUE AS TO THE RACIAL EXCLUSION OF NEGROES FROM THE GRAND JURY AND PETIT JURY WAS DETERMINED ADVERSELY TO PETITIONERS IN THEIR STATE COURT TRIAL AND THIS ISSUE CANNOT BE RETRIED OR COLLATERALLY ATTACKED IN A HABEAS CORPUS PROCEEDING.

After petitioners had been arraigned and entered pleas of not guilty and after counsel appointed by the Court to defend petitioners, and petitioners were represented by counsel of their own choosing, a motion to quash the bill of indictment for racial exclusion of colored people from the Grand Jury and a challenge to the array as to the Petit Jury were entered. (S.Tr. Vol. 1, p. 167—evidence on these motions, S.Tr. Vol. 1, pp. 2-167) Counsel appointed by the Court to defend petitioners were Mr. W. W. Speight and Mr. Arthur Corey. Mr. Speight was an experienced criminal lawyer, with a period of legal experience in the office of the Attorney General of the State. Mr. Arthur Corey was a skilled trial lawyer who had served several terms in the General Assembly of the State, and he had made many political campaigns all over Pitt County. He probably knew more people in the County than any other attorney. These lawyers did not think that it was to the best interest of their clients to attempt to quash the bill of indictment or challenge the array of the trial panel, in other words, they thought it was to the best interest of their clients not to raise the racial question. (See evidence of W. W. Speight, F.Tr. pp. 51-54—appendix to appelle's brief, C.C.A. 4, No. 6330, pp. 46-48.) Under the North Carolina practice (STATE v. BURNETTE, 142 N. C. 577, 55 S.E. 72; STATE v. BEAL, 199 N. C. 278, 294, 154 S.E. 604, 613; STATE v. BREWER, 180 N. C. 716, 717, 104 S.E. 655, 656), a motion to quash a bill of indictment must be entered before the persons indicted plead to the bill of indictment. If such a

motion is made after plea and arraignment, the allowance of the motion is in the discretion of the Court. The trial Court passed on these motions by considering the merits as shown by the evidence and also relied on the local practice to the effect that he had a discretion in the matter where the motion was made after arraignment, and basing his ruling on both grounds—merits and discretion—these motions of the petitioners were overruled. (S.Tr. Vol. 1, p. 167; trial Court's findings of fact on motions, S.Tr. Vol. 4, pp. 1-22—appendix to appellee's brief, C.C.A. 4, No. 6330, p. 125)

We think that in passing on this matter where collateral attack is made by the *habeas corpus* process, this Court should, to a large extent, view the matter from the standpoint of the State trial judge and the evidence before him. At the hearing before the district judge on *habeas corpus*, petitioners presented a considerable volume of evidence as to the sources of the members of the juries and as to the selection of the jury that was never presented before the State trial judge. If the Court will examine the transcript of evidence showing the proceedings at the State trial, the Court will see that the petitioners attacked the jury organization by showing the ratio between the racial population and by placing on the witness stand many colored witnesses who testified to facts tending to establish eligibility for jury duty and who further testified they had never served on any jury. The State likewise placed on the witness stand many white witnesses who testified that they were in the same situation.

The statutes governing the selection of jurors, both for Grand Jury and Petit Jury service, appear in the appendix, and it appears from the transcript that the petitioners did not contend in their motions that these jury statutes were, within themselves, unconstitutional but that petitioners contended that the statutes had been administered in such a manner as to result in an unconstitutional racial discrimination. (S.Tr. Vol. 4, p. 4)

The population of Pitt County appears to be 61,244 persons, of which 32,151 belong to the white race, and 29,086

belong to the Negro race. The evidence justifies the estimate, as found by the Court, that 17,323 persons of the white race were over twenty-one years of age, that 13,762 of the Negro race were over twenty-one years of age.

In the year of 1946, the total persons on the tax list were 15,517. Of these, 10,344 were white persons, and 5,173 were colored. This list is the list that would be used for the year of 1947. The total listed for taxes in 1945 was 14,368, and of this, 9,466 were of the white race, and 4,902 of the colored race. For the year of 1947, there was a total of 16,455, of which 10,894 belonged to the white race, and 5,561 belonged to the colored race. For the year of 1948, there was a total of 16,926, of which 11,193 belonged to the white race, and 5,733 belonged to the colored race. The Court will find the tabulation for the various years as to the tax list in S.Tr. Vol. 4, pp. 141, 142.

It was admitted by both the petitioners and the State that the jury boxes for the County contained the names of approximately 10,000 persons of both the white and Negro race. It was further found as a fact by the Court (S.Tr. Vol. 4, p. 5) that prior to the year of 1947, no Negro had served on the Grand Jury in the Superior Court of Pitt County in more than twenty years but that prior to 1947, members of the Negro race were occasionally called and served on the jury.

In 1947, the jury boxes of Pitt County were purged, and all names of jurors appearing on the scrolls were destroyed. A new list of names was prepared, both from the tax list and from other sources, and the evidence shows that there was nothing appearing on these lists to indicate whether a person was of the white or Negro race, although there was much evidence taken as to certain red marks appearing on some scrolls. The examination of the members of the Board of County Commissioners who are charged with constituting the jury box begins on S.Tr. Vol. 1, p. 112, and the Court will see that the red marks were explained and that they have no reference to race, dealing largely with changes of residence, deaths, etc.

When the June meeting was held of the Board of County

Commissioners for the purpose of purging the jury box, the County Attorney met with the Board of Commissioners and advised the Board that both under decisions of the State Supreme Court and of the Supreme Court of the United States, eligible Negroes could not be excluded from the jury list, (S.Tr. Vol. 1, pp. 122, 123) and that the list of names was composed of the tax list and from names of persons registered to vote in the various townships. The Commissioners also made investigations, each one in his own township.

The members of the Board of Commissioners, the Clerk to the Board of Commissioners, and all persons having anything to do with the jury list testified fully as to how the jury list was made up and how the jurors were selected. The Court will find this in S.Tr. Vol. 1, p. 112, et seq.

A public-local act is applicable to Pitt County whereby the membership of the Grand Jury is staggered so that nine members are chosen after the first days of January and July of each year to serve for a term of one year. This public-local act appears in S.Tr. Vol. 4, p. 15. It will thus be seen that although the Grand Jury which indicted the petitioners did not contain any colored persons, nine names were drawn according to the statute and from a box that contained the names of both white and colored. All names were drawn from the whole panel of jurors by a child under ten years of age as required by the statute. (S.Tr. Vol. 4, p. 16) It was furthermore found by the Court as a fact, and the evidence supports the finding, that members of the Negro race have been drawn for jury duty at practically every term of the Superior Court since the box was purged in July, 1947. (S.Tr. Vol. 4, p. 17) A venire of 150 jurors was ordered by the Court for the trial of this case for the purpose of supplementing the panel of regular jurors. Of these names drawn, five members were of the Negro race, and out of the total number of persons actually summoned by the Sheriff, two were Negroes, and of these two, one served upon the jury which tried these petitioners. (S.Tr. Vol. 4, p. 17)

In S.Tr. Vol. 1, pp. 72, 73, there will be found a list con-

taining the number of jurors summoned for jury duty from August, 1945, on through the May Term, 1947. The Clerk to the Board of Commissioners also appended an affidavit (S.Tr. Vol. 1, p. 73) showing the number of Negroes who were drawn for jury duty at each term. It should be carefully noted that there might have been more Negroes drawn at all of these terms, but from his knowledge, not less than the number set forth was drawn.

Both the petitioners and the State offered as witnesses several persons from each race who testified that they had never served on any jury in Pitt County although they were apparently eligible. It will be seen that a great many of these persons were ministers or undertakers, and by reason of their occupation were automatically excused from jury duty by the statute. A copy of the statute appears in the appendix. The testimony as to the white persons who have never served on a jury in the county begins in S.Tr. Vol. 1, p. 74, et seq.

It is not denied that under the Fourteenth Amendment, the eligible citizens of petitioners' race are entitled to their chance to serve on the various juries and cannot be deprived of this chance by design. But fairness in selection does not require a guaranteed proportional representation of the petitioners' race on every jury selected and constituted.

AKINS v. TEXAS, 324 U. S. 398, 89 L. ed. 1692
THOMAS v. TEXAS, 212 U. S. 278, 53 L. ed. 512
VIRGINIA v. RIVES, 100 U. S. 313, 25 L. ed. 667
SWAIN v. STATE, 215 Ind. 259, 18 N. E. (2d) 921, 926
ZIMMERMAN v STATE, ... Md. ....., 59 A. (2d) 675
CERTIORARI DENIED, 93 L. ed. (Ad. Op. No. 7) 425
16 C.J.S. (Constitutional Law), Sec. 540

The type of discrimination condemned is said to be "purposeful discrimination" (AKINS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692), or a "long-continued, unvarying, and wholesale exclusion of Negroes from jury service" (NORRIS v. ALABAMA, 294 U. S. 587, 79 L. ed. 1074).

There is a presumption that officers in charge of jury selection have performed their duty fairly and justly (TARRENCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 572, 116 So. 470 (Fla.) Certiorari denied in 278 U. S. 599, 73 L. ed. 525) and without discrimination against race or class. The burden of proof is upon petitioners to show an alleged discrimination in the selection of a grand or petit jury (AKINS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692; MURRAY v. LOUISIANA, 163 U. S. 101, 41 L. ed. 87).

In AKINS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692, the Court uses the words "purposeful discrimination." In NORRIS v. ALABAMA, 294 U. S. 587, 79 L. ed. 1074, the Court uses the words "long-continued, unvarying, and wholesale exclusion of Negroes from jury service."

It is very generally held that the burden of proof is on the defendant or defendants to show an alleged discrimination in the selection of a Grand or Petit Jury.

AKINS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692
MURRAY v. LOUISIANA, 163 U. S. 101, 41 L. ed. 87

There is a presumption that officers in charge of the selection and summoning of a jury or jury panel will be presumed to have performed their duty fairly and justly without discrimination against any race or class. In other words, discrimination in the selection of a jury will not be presumed.

TARRENCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 572, 116 So. 470 (Fla. (Certiorari denied in 278 U. S. 599, 73 L. ed. 525).

Fairness in selection has never been held to require proportional representation of races upon a jury.

AKINS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692
VIRGINIA v. RIVES, 100 U. S. 313, 25 L. ed. 667.
THOMAS v. TEXAS, 212 U. S. 278, 53 L. ed. 512.

A defendant has no constitutional right to be indicted or tried by any particular jury or by a jury composed in part of members of his race or class.

STATE v. PEOPLES, 131 N. C. 784, 42 S.E. 814
STATE v. SLOAN, 97 N. C. 499
STATE v. LOGAN, 341 Mo. 1164, 111 S.W. (2d) 110; 1937)
MARTIN v. TEXAS, 200 U. S. 316, 50 L. ed. 494

"It is unsafe, we think, to attach too much significance to abstract, mathematical ratios or to the so-called law of recurrences in determining whether there has been arbitrary discrimination in the selection of the juries."

SWAIN v. STATE, 215 Ind. 259, 18 N.E. (2d) 921, 926

The fact that in this case there were found separate lists with the word "colored" at the top of the page containing the list does not show discrimination.

Respondent contends, therefore, that the petitioners have not met the burden imposed upon them and as required by the principles stated in the case of FAY v. NEW YORK, 91 L. ed. 1517.

Under the North Carolina practice, the questions raised by the petitioners' motion to quash are in the first instance heard and decided by the trial Court. The trial Court makes findings of fact; and in the absence of an abuse of discretion or in the absence of lack of evidence to support findings, such decision of the trial Court is ordinarily binding upon the Supreme Court. This practice is illustrated by the following cases:

STATE v. HENDERSON, 216 N. C. 99, 3 S.E. (2d) 357
STATE v. BELL, 212 N. C. 20, 192 S.E. 852
STATE v. WALLS, 211 N. C. 487, 191 S.E. 232
STATE v. COOPER, 205 N. C. 657, 172, S.E. 199
STATE v. LORD, 225 N. C. 354, 34 S.E. (2d) 205

Respondent contends, therefore, that the Board of Commissioners of Pitt County, upon the advice of the County Attorney, purged the jury box in 1947 and Negroes have been serving on trial juries since that time, *one Negro serving on the jury that heard this case.* The fact that no Negroes appeared on the Grand Jury is not strange in view of the system of drawing nine Grand Jurors at a time under the system prevailing in Pitt County.

The whole situation as to the facts before the trial judge appears in his findings of fact on this issue which appear both in the State transcript and in the appendix of appellee's brief filed in the Circuit Court of Appeals for the Fourth Circuit. We have gone into the merits of the matter because the district judge passed upon the merits as will be seen from his findings of fact which appear in the record of the Circuit Court of Appeals. As to the evidence developed by petitioners in the hearing before the district judge on jury discrimination, we do not believe that the writ of *habeas corpus* can be used to amplify the record (KELLEY v. RAGEN, 129 F. (2d) 811, 813, C.C.A. 7) by bringing in newly discovered evidence nor can the writ of *habeas corpus* be used to enlarge the record and show additional grounds of defense. (JOHNSON v. HOY, 227 U. S. 245, 57 L. ed. 497; U. S. v. MULLIGAN, 67 F. (2d) 321, 323, C.C.A. 2)

Jury Discrimination in a State Trial with State Decision Thereon is not Subject to Retrial in Federal Court on Habeas Corpus.

The Superior Court of Pitt County is a Court of general jurisdiction (G. S. 7-63), and the Court had jurisdiction to try persons charged with murder as defined (G. S. 14-17) by the State statute. The constitutional issues as to jury discrimination having been raised and decided in the State trial are not subject to collateral attack in the Federal Court on *habeas corpus*. The criminal procedure of this State provided for an appeal to the Supreme Court of North Carolina to review these constitutional issues on jury discrimination, both as to Grand Jury and Petit Jury. (STATE v. SPELLER, 223 N. C. 67, 47, S.E. (2d), 537) In support of our position that racial discrimination in the selection of jurors, both Grand and Petit Jury, is an irregularity and does not cause the State trial Court to lose jurisdiction and is not subject to collateral attack on *habeas corpus*, we cite our authorities as follows:

IN RE WOOD, 140 U. S. 278, 35 L. ed. 505

JUGIRO v. BRUSH, 140 U. S. 370, 35 L. ed. 511
ANDREWS v. SWARTZ, 156 U. S. 272, 39 L. ed. 422
KAIZO v. HENRY, 211 U. S. 146, 53 L. ed. 125
IN RE WILSON, 140 U. S. 575, 35 L. ed. 513
CARRUTHERS v. REED, 8 Cir., 102 Fed. (2d) 933
EX PARTE MURRAY, 66 Fed. Rep. 297
EX PARTE CEASAR, D.C., Texas, 27 Fed. Supp. 690
U. S. EX REL. JACKSON v. BRADY, D.C., Md., 47 Fed. Supp. 362
JOHNSON v. WILSON, D.C., Ala., 45 Fed. Supp. 597 (Affirmed JOHNSON v. WILSON, 5 Cir. 131 Fed. (2d) 1)
STATE EX REL. PASSER v. COUNTY BOARD, 52 A.L.R. 916 (Minn.), Note p. 929
HALE v. CRAWFORD, 1 Cir., 65 Fed. (2d) 739
EURY v. HUFF, App. D.C., 146 Fed. (2d) 17
SCHOLZ v. SHAUGHNESSY, App. D. C., 180 Fed. (2d) 450
U. S. EX REL. McCANN v. THOMPSON, 2 Cir., 144 Fed. (2d) 604

In the case of IN RE WOOD, 140 U. S. 278, 35 L. ed. 505, the Court said:

> "If the question of the exclusion of citizens of the African race from the lists of grand and petit jurors had been made during the trial in the Court of General Sessions, and erroneously decided against the appellant, such error in decision would not have made the judgment of conviction void, or his detention under it illegal. SAVIN, PETITIONER, 131 U. S. 267, 279; STEVENS v. FULLER, 136 U. S. 468, 478. Nor would that error, of itself, have authorized the Circuit Court of the United States, upon writ of habeas corpus, to review the decision or disturb the custody of the accused by the state authorities. The remedy, in such case, for the accused, was to sue out a writ of error from this court to the highest court of the State having cognizance of the matter, whose judgment, if adverse to him in respect to any right, privilege or immunity, specially claimed under the Constitution or laws of the United States, could have been reexamined, and reversed, affirmed or modified, by this court as the law required. Rev. Stat. § 709."

In the case of JUGIRO v. BRUSH, 140 U. S. 370, 35 L. ed. 511, the Court said:

> "The statutes of New York regulating these matters do not, in any way, conflict with the provisions of the Federal Constitution; and if, as alleged, they were so administered by the state court, in appellant's case, as to discriminate against him because of his race, the remedy for the wrong done to him was not by a writ of habeas corpus from a court of the United States."

In the case of KAIZO v. HENRY, 211 U. S. 146, 53 L. ed. 125, the Court said:

> "These well-settled principles are decisive of the case before us. Disqualifications of grand jurors do not destroy the jurisdiction of the court in which an indictment is returned, if the court has jurisdiction of the cause and of the person, as the trial court had in this case. *Ex parte Harding*, 120 U.S. 782; *in re Wood*, 140 U. S. 278; *In re Wilson*, 140 U. S. 575. See *Matter of Moran*, 203 U. S. 96, 104. The indictment, though voidable, if the objection is seasonably taken, as it was in this case, is not void. *United States v. Gale*, 109 U. S. 65. The objection may be waived, if it is not made at all or delayed too long. This is but another form of saying that the indictment is a sufficient foundation for the jurisdiction of the court in which it is returned, if jurisdiction otherwise exists. That court has the authority to decide all questions concerning the constitution, organization and qualification of the grand jury, and if there are errors in dealing with these questions, like all other errors of law committed in the course of the proceedings, they can only be corrected by writ of error."

In the case of ANDREWS v. SWARTZ, 156 U. S. 272, 39 L. ed. 422, the Court said:

> "Even if it be assumed that the state court improperly denied to the accused, after he had been arraigned and pleaded not guilty, the right to show by proof that persons of his race were arbitrarily excluded by the sheriff from the panel of grand or petit jurors solely because of their race, it would not follow that the court lost jurisdiction of the case within the meaning of the well-established rule that a prisoner under con-

> viction and sentence of another court will not be discharged on habeas corpus unless the court that passed the sentence was so far without jurisdiction that its proceedings must be regarded as void."

In the case of CARRUTHERS v. REED, 8 Cir., 102 Fed. (2) 933, the Court said:

> "Under the law of Arkansas a challenge to the panel or motion to squash must be promptly made and it is too late if the jury has been empanelled and sworn. Brown v. State, 12 Ark. 623 (See 35 C.J. 377). If no objection was made at the trial, it is too late to urge it for the first time after verdict.
> *"The right to challenge the panel is a right that may be waived and is waived if not seasonably presented.* Such rights, if waived during trail, may not be availed of by attack, in a collateral proceeding. Bracey v. Zerbst, 10 Cir., 93 F. 2d 8." (Emphasis supplied)

In GLASGOW v. MOYER, 225 U. S. 420, 429, 32 S. Ct. 753, 756, 56 L. ed. 1147, the Court, after reviewing the cases, said:

> "The principle of the cases is the simply one that if a court has jurisdiction of the case, the writ of habeas corpus cannot be employed to *re-try* (italics ours) the issues, whether of law, constitutional or other, or of fact."

In the case of U. S. v BRADY, 133 Fed. (2d) 476, in passing on a State trial in the City of Baltimore, it appeared that the service file of jurors was made up of the names of 18,901 white and 653 colored persons. At the time of the trial, there were seven jury panels of 25 each in the Courts of Baltimore containing eight Negroes out of a total of 175 men. The Grand Jury had always contained one colored juror. On review, the Circuit Court of Appeals for the Fourth Circuit, Judge Soper writing for the Court, found that no discrimination existed. It should also be added that a good part of the opinion rests upon the doctrine of waiver.

III.

THE CONSTITUTIONAL ISSUE AS TO THE VOLUNTARINESS OF PETITIONERS' CONFESSIONS WAS HEARD AND DETERMINED BY THE STATE TRIAL COURT, AND THE RULING OF THE STATE COURT CANNOT NOW BE RETRIED OR COLLATERALLY ATTACKED BY THE PROCESS OF HABEAS CORPUS.

Petitioners contend that their confessions introduced in evidence against them were obtained by coercion, force and violence contrary to the Fourteenth Amendment. (For confessions, see appendix, pp. 96, 97a appelle's brief, C.C.A. 4, No. 6330—S.Tr. Vol. 1, pp. 273 and 276.) Petitioners were arrested at different times and places and taken to Martin County for safekeeping. (See evidence of Sheriff Ruel W. Tyson, F.Tr. p. 184—appendix, p. 50, appellee's brief, C.C.A. 4—see evidence of all other officers present at arrest, Federal Transcript, evidence of respondent.) The circumstances of these arrests and the procuring of these confessions are also discussed in respondent's brief filed at October Term, 1949, No. 412, Misc., DANIELS v. NORTH CAROLINA. Petitioners, in their brief—p. 25—make the astonishing statement that they were subjected to questioning by police officers at least 42 hours in the case of Lloyd Ray Daniels and 14 hours in the case of Bennie Daniels. This is simply not true, and we invite the Court to review the records on this point. Petitioner, Bennie Daniels, himself, estimates that he was interviewed about an hour and one-half before the written confessions were signed. (See S.Tr. Vol. 1, p. 265.) Bennie Daniels claimed at the State trial that one of the officers slapped him, and when all of the officers stood up, he could not identify the officer who he contended inflicted the slap. Yet at the hearing on *habeas corpus*, almost two years later, his memory was so refreshed by the passing of time that he testified on the *habeas corpus* hearing (F.Tr. p. 164) that Chief Page was the man who struck him. Yet he denied that Chief Page was the man on the State trial. Lloyd Ray

Daniels contended on the *habeas corpus* hearing that when he was in the jail at Williamston, he asked to see his mother. This is an after-thought for on the State trial, he never gave any evidence to this effect. The truth is that the petitioners never, at any time, asked to see any attorney or friends. When Bennie Daniels was arrested, the sheriff took him by his father's home and told his relatives that Bennie was under arrest. (See F.Tr. p. 192.) The arrests were made without warrants because the officers had information that there were bloody clothes at the home of Lloyd Ray Daniels and that one of the petitioners had sent word to this home to burn or destroy these clothes. No State law was, therefore, violated as to the detention of these petitioners for they had been arrested on a felony, a capital offense. (See STATE v. EXUM, 213 N. C. 16, 195 S.E. 7. See also appellee's brief, p. 22, C.C.A. 4, No. 6330—see respondent's brief, October Term, 1949, No. 412, Misc., pp. 7-11.)

The officers who arrested the petitioners deny that they used any coercion or physical violence. Where there is a conflict of testimony on these points (WATTS v. INDIANA, 338 U. S. 49, 93 L. ed. 1801, 1804; LYONS v. OKLAHOMA, 322 U. S. 596, 88 L. ed. 1481; LISENBA v. CALIFORNIA, 314 U. S. 219, 86 L. ed. 166), the Federal Courts do not consider the question on its merits, and the findings of the State Court being supported by substantial evidence is allowed to stand. The mere questioning of a suspect while in the custody of police officers (GALLEGOS v. NEBRASKA, No. 94, October Term, 1951; LYONS v. OKLAHOMA, 322 U. S. 596, 88 L. ed. 1481) is not prohibited by common law or by the due process clause of the Federal Constitution.

Under the North Carolina practice, the trial judge, in the absence of the jury, determines whether or not the confession was voluntary and should, therefore, be or not be submitted to the jury. See STATE v. WHITENER, 191 N. C. 659, 132 S.E. 603; STATE v. ROGERS, 216 N. C. 731, 6 S.E. (2d) 499; STATE v. DICK, 60 N. C. 440. The facts that render a confession involuntary, the admissibility of

the evidence to establish such facts and the existence of evidence to support a finding as to admissibility (STATE v. CROWSON, 98 N. C. 595, 4 S.E. 143) are questions of law subject to review. The weight of the evidence and the credibility of the witnesses offered to prove or disprove such facts are matters for the trial judge and will not be reviewed. See STATE v. GRASS, 223 N. C. 31, 25 S.E. (2d) 193; STATE v. GOSNELL, 208 N. C. 401, 181 S.E. 323. If the confession is admitted in evidence, its weight is for the jury (STATE v. HARDEE, 83, N. C. 619; STATE v. HENDERSON, 180 N. C. 735, 105 S.E. 339), and the jury may believe the confession or not, and the jury is the judge of its sufficiency to prove the fact confessed. The States use different methods to test the voluntariness of a confession (STATE v. CRANK, 170 A.L.R. 542, Anno. p. 567), and North Carolina is included in the twelve States that use this same method. If the method used gives opportunity for notice and hearing and other fundamentals of fairness, the State can use its own method of determining the voluntariness of confessions, and no question arises under the due process or the equal protection of the law clause of the Fourteenth Amendment. See LISENBA v. CALIFORNIA, *supra;* WARD v. TEXAS, 316 U. S. 547, 86 L. ed. 1663; LYONS v. OKLAHOMA, *supra*.

Petitioners having raised the issue as to the constitutionality of the admissions of the confessions and this issue having been decided against them by the trial Court, the petitioners cannot now re-try these issues in the Federal Court by collateral attack through the use of a habeas corpus process.

COLLINS v. McDONALD, 258 U. S. 416, 66 L. ed. 692
SCHRAMM v. BRADY, 4 Cir., 129 Fed. (2d) 109
MILLER v. HIATT, 3 Cir., 141 Fed. (2d) 691
BURALL v. JOHNSON, 9 Cir., 134 Fed. (2d) 614
U. S. v. LOWREY, D. C., Pa. 84 Fed. Supp. 804
HARLAN v. McGOURIN, 218 U. S. 442, 54 L. ed. 1101
SNELL v. MAYO, 5 Cir., 173 Fed. (2d) 704
EURY v. HUFF, App. D. C., 146 Fed. (2d) 704
MASSEY v. HUMPHREY, D. C., Pa., 85 Fed. Supp. 534

U. S. EX REL. v. HIATT, D. C. Pa., 33 Fed. Supp. 1002
U. S. EX REL. HOLLY v. PA., D. C. Pa., 81 Fed. Supp. 861
(Affirmed) 3 Cir., 174 Fed. (2d) 480
WALLACE v. HUNTER, 10 Cir., 149 Fed. (2d) 59
SMITH v. LAWRENCE, 5 Cir., 128 Fed. (2d) 822

In the case of COLLINS v. McDONALD, 258 U. S. 416, 66 L. ed. 692, the Court said:

> "It is also charged that there was no evidence of guilt before the court-martial other than the confession of the accused, which, it is averred, was made, under oath, to and at the instance of his superior officer, under duress, whereby it is alleged he was compelled to become a witness against himself, in violation of the Constitution of the United States. This, in substance, is a conclusion of the pleader, unsupported by any reference to the record, and, at most, was an error in the admission of testimony, which cannot be reviewed in a habeas corpus proceeding. Cases, *supra*."

In the case of SCHRAMM v. BRADY, 4 Cir., 129 Fed. (2d) 109, the Court said:

> "Nor can the writ of habeas corpus be used to review alleged error of the state court in admitting evidence of a confession, for habeas corpus cannot be used as a writ of error."

In the case of U. S. v. LOWREY, D. C., Pa., 84 Fed. Supp. 804, the Court said:

> "The contention that the confession was secured under circumstances rendering it inadmissible presents a question of admissibility of evidence which was an appropriate matter for an appeal, and hence not subject to review by habeas corpus."

In the case of BURALL v. JOHNSON, 9 Cir., 134 Fed. (2d) 614, the Court said:

> "The time to inquire into the circumstances of the confession was during the progress of the trial, and error committed, if any, was subject to correction on appeal."

In the case of WALLACE v. HUNTER, 10 Cir., 149 Fed. (2d) 59, the Court said:

> "At the habeas corpus hearing Story testified that at the trial on the criminal charge he testified that 'they threatened me to give it', referring to the confession. The confession, on its face, recites: 'I make this statement freely and voluntarily, no force, coercion, threat, promise or inducement having been made in order to obtain this statement from me. I have been advised that I am not required to make this statement, that I have the right to an attorney, and that this statement may be used against me in Court.' The evidence adduced at the habeas corpus hearing affords no basis for a holding on this, a collateral attack, that the trial court and jury were not fully warranted in finding that the confession was freely and voluntarily made."

In the caes of PERRY v. HIATT, D.C., App. 33 Fed. Supp. 1023, the Court said:

> "Relator's argument that because he had a mistaken idea of the nature of the offense charged and was thereby misled into making a false confession, raises a question which this court cannot consider in habeas corpus proceedings. Widener v. Harris, 4 Cir., 60 F. 2d 956."

In the case of EURY v. HUFF, App. D. C., 146 Fed. (2d) 17, the Court said:

> "Assuming the petition means that an involuntary confession was actually received in evidence, still that question could not be retried by the procedure of habeas corpus. Sufficiency of the evidence to support a conviction is not jurisdictional and is not open to review in habeas corpus proceedings."

IV.

NO CONSTITUTIONAL QUESTION IS PRESENTED BY THE TRIAL COURT'S INSTRUCTIONS TO THE JURY AS TO THE ADMISSION OF THE CONFESSIONS.

Petitioners contend that the trial Court's instructions to the jury as to the admissibility of the confessions deprived them of the right of trial by jury. The instructions of the trial Court will be found on p. 37 of the appendix

of appellee's brief, C.C.A. 4. No. 6330. (See also S.Tr. Vol. 4, p. 642 and p. 676.) A reading of the instruction complained of will show that counsel for petitioners had been making argument to the jury on the question as to whether or not the confessions had been made freely and voluntarily. The instructions of the Court as to the admissibility of the confessions (STATE v. FAIN, 216 N. C. 157, 4 S.E. (2d) 319) were legal and proper according to State law; and under the holdings of this Court, no constitutional question under the Fourteenth Amendment is presented. See DAVIS v. TEXAS, 139 U. S. 651, 35 L. ed. 300; HOWARD v. KENTUCKY, 200 U. S. 164, 50, L. ed. 421; MILLER v. TEXAS, 153 U. S. 535, 38 L. ed. 812; CARTER v. ILLINOIS, 329 U. S. 173, 91 L. ed. 172; BUCHALTER v. NEW YORK, 319 U. S. 427, 87 L. ed. 1492; SNYDER v. MASSACHUSETTS, 291 U. S. 97, 78 L. ed. 674; CHAPLINSKY v. NEW HAMPSHIRE, 315 U. S. 568, 86 L. ed. 1031.

In our statement of facts, we quoted another confession made by Lloyd Ray Daniels when he was at the State Hospital at Goldsboro which was made without any coercion or threats but for the first time came to the knowledge of the State at the Federal hearing on *habeas corpus*.

V.

THE PETITIONERS HAVING FAILED TO PERFECT THEIR APPEAL TO THE SUPREME COURT OF NORTH CAROLINA, NO CONSTITUTIONAL QUESTION IS PRESENTED AS TO ANY DEPRIVATION OF RIGHT TO APPEAL.

The petitioners contend, on the authority of DOWD v. UNITED STATES EX REL. COOK, 340 U. S. 206, 95 L. ed. 215, and COCHRAN v. KANSAS, 316 U. S. 255, 86 L. ed. 1453, that they had been unconstitutionally deprived of their right of appeal. The answer to this is that the petitioners had available an appeal to a Supreme Court that reviews all of the constitutional questions raised by petitioners. They failed to perfect the appeal according to

State practice, and the rules of procedure as to appeals in North Carolina are applicable to all people of all races. It cannot be shown, nor do petitioners even contend, that any State officer prevented petitioners from meeting these procedures. The cases relied on by petitioners on this point deal with situations where officials and agents of State Penitentiaries retained and prevented appeal papers from leaving the Penitentiaries and thus prevented those petitioners from perfecting their appeals in time. There is absolutely no analogy whatever to the situation now before the Court.

VI.

PETITIONERS CANNOT USE HABEAS CORPUS AS A SUBSTITUTE FOR AN APPEAL.

The principle stated above is an old principle, but it is supported by many cases. It is perfectly plain from the record in this case that the petitioners having failed to perfect their appeal are simply trying now to use the writ of *habeas corpus* as a substitute for the appeal which they could have had but lost through their own negligence. Because constitutional questions are raised in a State Court in a criminal trial, this does not, within itself, warrant the review of such questions on habeas corpus. See EURY v. HUFF, 141 Fed. (2d) 554, 555, C.C.A. 4; GLASGOW v. MOYER, 225 U. S. 420, 56 L. ed. 1147; GRAHAM v. SQUIER, 132 Fed. (2d) 681, C.C.A. 9.

CONCLUSION

The record in this case justifies the conclusion that the petitioners murdered their victim in a cruel, horrible and savage manner, and they themselves admit that they committed this murder. Their admission is corrobrated by other facts and circumstances. In interpreting the Constitution of the United States, Federal statutes and State laws, and in balancing the rights of the parties, we ask the Court to consider the claims of the victim of this murder.

Respectfully submitted,

HARRY McMULLAN,
Attorney General of North Carolina

RALPH MOODY,
Assistant Attorney General of North Carolina

R. BROOKES PETERS, JR.,
General Counsel of State Highway and Public Works Commission

E. O. BROGDEN, JR.,
Attorney for State Highway and Public Works Commission

Attorneys for Respondent

APPENDIX

Chapter 1, General Statutes of North Carolina:

§ 1-279. *When appeal taken, stay of execution.*—The appeal must be taken from a judgment rendered out of term within ten days after notice thereof, and from a judgment rendered in term within ten days after its rendition, unless the record shows an appeal taken at the trial, which is sufficient, but execution shall not be suspended until the giving by the appellant of the undertakings hereinafter required.

§ 1-282. *Case on appeal; statement, service, and return.*—The appellant shall cause to be prepared a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the request of the counsel of the parties for instructions if there by any exceptions on account of the granting or withholding thereof, and stating separately, in articles numbered, the errors alleged. A copy of this statement shall be served on the respondent within 15 days from the entry of the appeal taken; within 10 days after such service the respondent shall return a copy with his approval or specific amendments indorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved: Provided, that the judge trying the case shall have the power, in the exercise of his discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counter statement of case.

Chapter 7, General Statutes of North Carolina:

§ 7-63. *Original jurisdiction.*—The superior Court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court; and of all criminal actions in which the punishment may exceed a fine of fifty dollars, or imprisonment for thirty days; and of all such affrays as shall be committed within one

mile of the place where, and during the time, such court is being held; and of all offenses whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace shall not within twelve months after the commission of the offense proceed to take official cognizance thereof.

Chapter 9, General Statutes of North Carolina:

§ 9-1. The board of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of county commissioners or such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commissioners or such jury commissions, in making out the list of names to be laid before the board of county commissioners or such jury commissions, may secure said lists from such sources of information as deemed reliable which will provide the names of persons of the county above twenty-one years of age residing within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be non compos mentis.

§ 9-2. *Names on list put in box.*—The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

§ 9-3. *Manner of drawing panel for term from box.*—At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls except when the term of court is for the trial of civil cases exclusively, when they need not draw more than twenty-four scrolls. The persons whose names are inscribed on said scrolls shall serve as jurors at the term of the superior court to be held for the county ensuing such drawing, and for which they are drawn. The scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said commissioners may, at the same time and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined.

§ 9-6. *Jurors having suits pending.*—If any of the jurors drawn have a suit pending and at issue in the superior

court, the scrolls with their names must be returned into partition No. 1 of the jury box.

§ 9-7. *Disqualified persons drawn.*—If any of the persons drawn to serve as jurors are dead, removed out of the county, or otherwise disqualified to serve as jurors, the scrolls with the names of such persons must be destroyed, and in such cases other persons shall be drawn in their stead.

§ 9-8. *How drawing to continue.*—The drawing out of partition marked No. 1 and putting the scrolls drawn into partition No. 2 shall continue until all the scrolls in partition No. 1 are drawn out, when all the scrolls shall be returned into partition No. 1 and drawn out again as herein directed.

§ 9-19. *Exemptions from jury duty.* — All practicing physicians, licensed druggists, telegraph operators who are in the regular employ of any telegraph company or railroad company, train dispatchers who have the actual handling of either freight or passenger trains, regularly licensed pilots, regular ministers of the gospel, officers or employees of a state hospital for the insane, active members of a fire company, funeral directors and embalmers, printers and linotype operators, all millers of grist mills, all United States railway postal clerks and rural free delivery mail carriers, locomotive engineers, brakemen and railroad conductors in active service, radio broadcast technicians, announcers, and optometrists, registered or practical nurses in active practice and practicing attorneys at law, and all members of the national guard, North Carolina state guard and members of the civil air patrol, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, who comply with and perform all duties required of them as members of the national guard, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, shall be exempt from service as jurors.

§ 9-24. *How grand jury drawn.*—The judges of the superior court, at the terms of their courts, except those

terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court.

§ 9-29. *Special venire to sheriff in capital cases.*—When a judge of the superior court deems it necessary to a fair and impartial trial of any person charged with a capital offense, he may issue to the sheriff of the county in which the trial may be a special writ of venire facias, commanding him to summon such number of persons qualified to act as jurors in said county as the judge may deem sufficient (such number being designated in the writ), to appear on some specified day of the term as jurors of said court; and the sheriff shall forthwith execute the writ and return it to the clerk of the court on the day when it is returnable, with the names of the jurors summoned.

§ 9-30. *Drawn from jury box in court by judge's order.*—When a judge deems a special venire necessary, he may, at his discretion, issue an order to the clerk of the board of commissioners for the county, commanding him to bring into open court forthwith the jury boxes of the county, and he shall cause the number of scrolls as designated by him to be drawn from box number one by a child under ten years of age. The names so drawn shall constitute the special venire, and the clerk of the superior court shall insert their names in the writ of venire, and deliver the same to the sheriff of the county, and the persons named in the writ and no others shall be summoned by the sheriff. If the special venire is exhausted before the jury is chosen, the judge shall order another special venire until the jury has been chosen. The scrolls containing the names of the persons drawn as jurors from box number one shall, after the jury is chosen, be placed in box number two, and if box number one is exhausted before the jury is chosen,

the drawing shall be completed from box number two after the same has been well shaken.

Chapter 14, General Statutes of North Carolina:

§ 14-17. *Murder in the first and second degree defined; punishment.*—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the state's prison.

Chapter 15, General Statutes of North Carolina:

§ 15-41. *When officer may arrest without warrant.*—Every sheriff, coroner, constable, officer of police, or other officer, entrusted with the care and preservation of the public peace, who shall know or have reasonable ground to believe that any felony has been committed, or that any dangerous wound has been given, and shall have reasonable ground to believe that any particular person is guilty, and shall apprehend that such person may escape, if not immediately arrested, shall arrest him without warrant, and may summon all bystanders to aid in such arrest.

§ 15-42. *Sheriffs and deputies granted power to arrest felons anywhere in state.*—When a felony is committed in any county in this State, and upon the commission of the felony, the person or persons charged therewith flees or flee the county, the sheriff of the county in which the crime was committed, and/or his bonded deputy or de-

puties, either with or without process, is hereby given authority to pursue the person or persons so charged, whether in sight or not, and apprehend and arrest him or them anywhere in the State.

§ 15-180. *Appeal by defendant to supreme court.*—In all cases of conviction in the superior court for any criminal offense, the defendant shall have the right to appeal, on giving adequate security to abide the sentence, judgment or decree of the supreme court, and the appeal shall be perfected and the case for the supreme court settled, as provided in civil actions.